SUPREME COURT OF THE UNITED STATES.

No. 98.—October Term, 1927.

Chesapeake and Ohio Railway Company, Petitioner, *vs.* K. S. Leitch.	On Writ of Certiorari to the Supreme Court of Appeals of the State of West Virginia.

[April 9, 1928.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an action brought by the respondent, an engineer, to recover from the petitioner for injuries suffered by him through contact with a mail crane or mail sack hanging from it as he looked from the window of his engine upon the petitioner's road. There is no doubt that the case is governed by the Federal Employers Liability Act, but the respondent got a verdict in the State Court which was sustained by the Supreme Court of Appeals, — W. Va., —, and the question is whether there is any sufficient distinction between this and *Southern Pacific Co.* v. *Berkshire*, 254 U. S. 415, in which it was held that the engineer took the risk. The grounds of that decision were that it is impracticable to require railroads to have no structures so near to their tracks as to endanger persons who lean from the windows of the cars; that they are obliged to erect mail cranes near enough to the tracks for the trains to pick up mail sacks without stopping; that it is almost if not quite impossible to set the cranes so far away as to leave no danger to one leaning out, and that in dealing with a well known incident of the employment, adopted in the interest of the public, it is unreasonable to throw the risk of it upon those who were compelled to adopt it.

Of course it is answered that these general considerations should not exonerate the railroads from using such care as they can within the conditions. But it seems to us unjust to let the risk of a danger that in any event is imminent vary upon disputed evidence that the danger was brought an inch or two nearer than it would have been if a blue print adopted for the whole line had been followed

with a more precisely mathematical accuracy. In the *Berkshire* case the testimony for the plaintiff left a distance of fourteen inches from the end of the crane to the car. Here the plaintiff's witness makes it ten. The witnesses for the petitioner with greater plausibility make it appreciably more. If there is to be a standard in these cases, and if, as decided, the general rule is that the engineer takes the risk, the railroad should not be made liable for this class of injury except where some unquestionable disregard of obvious precautions is shown. The plaintiff here as in *Berkshire's* case well knew of the existence of the crane, which had been in place for three or four years. He was an experienced engineer and although here as there presumably he never had measured the distance, he like Berkshire knew the fact that threatened danger. At the trial Leitch testified that he was looking to see the position of a block signal, pointedly contradicting a statement that he dictated and signed near the time of the accident. He admitted however that it was the fireman's business to look out for the block and notify him, and the fireman's more favorable position for seeing and other circumstances sufficiently indicate that there was no great or sudden emergency, if that would affect the case. Without discussing the evidence in detail we are satisfied upon a consideration of it that it does not show grounds for making an exception to the general rule.

Judgment reversed

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 501.—October Term, 1927.

Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Appellant, *vs.* A. G. Risty, Chris Olson, L. E. Larson, et al., etc., et al.	Appeal from the District Court of the United States for the District of South Dakota.

[April 9, 1928.]

Mr. Justice Stone delivered the opinion of the Court.

This is a suit brought by appellants, receivers of the Chicago, Milwaukee & St. Paul Railway Co. in the district court for South Dakota against the appellees, county commissioners of Minnehaha County, to enjoin the apportionment and assessment of benefits upon appellants' land for the maintenance of a drainage system, under the state agricultural drainage statutes, S. Dak., Laws 1907, c. 134, reenacted as S. Dak. Rev. Code (1919) §§ 8458-8491, as amended by S. Dak., Laws 1920, c. 46, on the ground that the statutes and the proceedings had under them are in conflict with the Fourteenth Amendment of the federal Constitution. From an order of the district court, three judges sitting, denying an application for an interlocutory injunction the case comes here on direct appeal. Jud. Code §§ 238, 266; *Smith* v. *Wilson*, 273 U. S. 388.

One phase of the controversy now presented and the statutes involved were before this Court in *Risty* v. *Chicago, Rock Island and Pacific Ry.*, 270 U. S. 378. In that case it appeared that the railroad company, which is represented by the appellants here, owned lands in Minnehaha County, some of which had not been included within an established drainage district known as "Ditch No. 1 and Ditch No. 2". Those ditches having been seriously damaged by floods, a proceeding had been begun before the county commissioners for the enlargement and reconstruction of the sys-

tem, now described as "Drainage District No. 1 and 2", with the object of assessing the benefits and cost of the work on lands of the railroad company and others lying both within and without the original drainage district.

The suit was begun by the railroad company in the district court for South Dakota to enjoin the county officers from making any apportionment and assessment of benefits affecting the property of the railroad company, on the ground that the drainage statutes of South Dakota and the proceedings under them violated the Fourteenth Amendment of the federal Constitution. The district court held that the statutes were valid and constitutional but that the assessments for reconstruction and maintenance of the existing drainage system, so far as applied to lands outside the original drainage district, were unauthorized by the state statutes. *Chicago, Rock Island and Pacific Ry.* v. *Risty*, 282 Fed. 364. No appeal was taken by the railroad company from the decree of the district court, but on appeal by the county officials so much of the decree as involved the construction of the drainage statutes and their application to lands outside of the original drainage district was affirmed by the circuit court of appeals for the eighth circuit, 297 Fed. 710, and by this Court in *Risty* v. *Chicago, Rock Island and Pacific Ry., supra.*

Following the decision in this Court the appellants began the present suit, in which they raised anew the questions as to the constitutionality of the South Dakota drainage statutes, and sought relief the effect of which, if granted, would be to enjoin those assessments on the land of plaintiffs within the original drainage district which had been left undisturbed by the decree in the earlier litigation.

Appellees, on the present application for an interlocutory injunction, have set up that decree as *res judicata* as to all questions presented here. But an examination of the decree of the district court in the earlier litigation, set out in the present record, discloses that by its terms the decree was "without prejudice to any and all rights of the plaintiff to contest any such apportionment of benefits, or any assessment which may be made" affecting the land of appellants within the original drainage district and saving the right of the railroad company in this regard as though "this suit had not been instituted or this decree entered." Although reliance

is placed upon this decree as *res judicata*, neither the record nor the briefs disclose the reason for the insertion of these provisions and no reason is suggested why its language is not to be taken at its face value as saving to appellants the right to litigate anew the questions now presented.

Since our decision in *Risty* v. *Chicago, Rock Island and Pacific Ry., supra*, the supreme court of South Dakota in *State* v. *Risty*, — S. Dak. —, 213 N. W. 952, has had occasion to pass upon the construction and the constitutionality of the South Dakota drainage statutes. Taking a different view from that of this Court and the lower courts in *Risty* v. *Chicago, Rock Island and Pacific Ry., supra*, it held that the proceedings involved in that litigation and in this, for the assessment of benefits upon lands both within and without the original drainage district, were authorized by the statutes of South Dakota. It held that the action taken for reconstruction of the old drainage ditches was not a proceeding for maintenance or repair of the old system, but a new and independent proceeding, and that the statutes authorized the establishment of a new drainage district embracing all the lands benefited, whether included in the old district or not. It also construed the sections regulating the proceedings for assessing the benefits and costs of the reconstruction and enlargement of the drainage ditches and, as construed, held them constitutional. This construction of the state statutes by the highest court of the state we, of course, accept. *People of Sioux County* v. *National Surety Co.*, February 20, 1928; *St. Louis & Kansas City Land Co.* v. *Kansas City*, 241 U. S. 419, 427.

As determined by the state supreme court in *State* v. *Risty, supra*, the proceedings resulting in the proposed assessment now assailed were taken and authorized under S. Dak. Rev. Code (1919) §§ 8458-8463, as amended. Under § 8459 upon petition of the owners of land "likely to be affected by the proposed drainage" the Board of County Commissioners, under § 8460, caused a survey to be made of the proposed drainage project and, under § 8461, upon the filing of the surveyor's report with the Commission, fixed the line of the proposed drainage ditch as that of the preexisting ditches No. 1 and No. 2, but increased the width of the ditch from approximately forty feet, as originally established, to ninety feet. Notice of hearing upon the petition was given by publication and posting as required by

§ 8461, printed in the margin.[1] The notice as required described "the route of the proposed drainage and the tract of country likely to be affected thereby in general terms" and specifically included the lands of the appellant, which are described in the present bill of complaint. Upon the hearing the Board of County Commissioners, acting under § 8462, made its order establishing the drainage as prayed. Proceeding under § 8463, printed in the margin,[2] the Board then fixed tentatively the proportion of benefits of the drainage among the lands affected and particularly described and gave published notice of the time and place for all owners of the land to be heard on equalization of the benefits.

At the outset appellant challenges the constitutionality of the statutes and proceedings on the ground that the notice of the hearing on the petition for the establishment of the drainage project fell short of constitutional requirements. It is said that notice to all persons affected by the proposed drainage, describing only "the route of the proposed drainage and the tract of country likely to be affected thereby in general terms" is too vague and indefinite to constitute notice to any land owner other than those through whose land the drainage ditch is to be constructed.

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[1] § 8461. Surveyor's Report—Notice of Hearing.—The surveyor shall report in writing to the board of county commissioners and his report shall be filed with the petition. After personal inspection or after the receipt of the surveyor's report the board shall determine the exact line and width of the ditch, if the same shall not be fixed in the petition, and shall file its determination with the petition. The board shall then fix a time and place for the hearing of the petition and shall give notice thereof by publication at least once each week for two consecutive weeks in a newspaper of the county, to be designated by the board, and by posting copies of such notice in at least three public places near the route of the proposed drainage. Such notice shall describe the route of the proposed drainage and the tract of country likely to be affected thereby in general terms, the separate tracts of land through which the proposed drainage will pass and give the names of the owners thereof as appears from the records of the office of the register of deeds on the date of the filing of the petition, and shall refer to the files in the proceedings for further particulars. Such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed, and shall summon all persons deeming themselves damaged by the proposed drainage or claiming compensation for the lands proposed to be taken for the drainage to present their claim therefor at such hearing.

[2] § 8463. Equalization of Benefits.—After the establishment of the drainage and the fixing of the damages, if any, the board of county commissioners shall

If it were necessary to our decision, we should hesitate to say that the required notice was insufficient, at least as to the owners of land embraced within the old district. For it showed unmistakably that the projected improvements were in substance an enlargement of a drainage ditch for the construction of which the lands within the district, including appellants', had already been assessed. No particular form of notice is necessary to satisfy constitutional requirements. If it be such as fairly apprises the land owner of what is proposed and affords reasonable opportunity to be heard it suffices. *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, 283. No one who, like appellants, had paid assessments for the original construction of the ditch could have doubted that his lands were within the tract "likely to be affected" by the proposed reconstruction.

But in any case there is no constitutional reason why any notice need have been given, for the purpose of the first hearing is not to determine what lands are to be included in the assessment district. It was said by the supreme court of South Dakota in *State* v. *Risty*, — S. Dak. at —, 213 N. W. at 959:

> "The hearing upon this notice is not for the purpose of determining the particular land that may be benefited by the con-

fix the proportion of benefits of the proposed drainage among the lands affected, and shall appoint a time and place for equalizing the same. Notice of such equalization of proportion of benefits shall be given by publication at least once each week for two consecutive weeks in a newspaper of the county to be designated by the board, and by posting copies of such notice in at least three public places near the route of the proposed drainage. Such notice shall state the route and width of the drainage established, a description of each tract of land affected by the proposed drainage and the names of the owners of the several tracts of land as appears from the records of the office of the register of deeds at the date of the filing of the petition and the proportion of benefits fixed for each tract of property, taking any particular tract as a unit, and shall notify all such owners to show cause why the proportion of benefits shall not be fixed as stated. Upon the hearing of the equalization of the proportion of benefits, the board of county commissioners shall finally equalize and fix the same according to benefits received. The proportion of benefits which any county, city, town or township may obtain by the construction of such drainage to highways or otherwise, and the benefits which any railroad company may obtain for its property by such construction, shall be fixed and equalized together with the proportion of benefits to tracts of land. Benefits to be considered in any case shall be such as accrue directly by the construction of such drainage or indirectly by virtue of such drainage being an outlet for connection drains that may be subsequently constructed.

> struction of ditch, nor the extent to which any tract of land may be benefited, but to determine whether the proposed drainage or any variation thereof shall be 'conducive to the public health, convenience, or welfare, or necessity, or practical for draining agricultural lands.' If the board finds that such drainage will be conducive to the public health, convenience, or welfare, or necessary or practical for draining agricultural lands, the board may establish the drainage accordingly and proceed to let contracts for the work. It then becomes necessary to determine the particular tracts of land that will be benefited by the drainage and the extent to which it will be benefited."

Due process of law does not require notice of a proceeding to determine merely whether an improvement shall be constructed without at the same time establishing the boundaries of the assessment district. It is enough if land owners who may be assessed are later afforded a hearing upon the assessment itself. *Londoner* v. *Denver*, 210 U. S. 373, 378; *Goodrich* v. *Detroit City*, 184 U. S. 432, 437, *et seq.*; *Voight* v. *Detroit*, 184 U. S. 115, 122; *Embree* v. *Kansas City Road District*, 240 U. S. 242; *Soliah* v. *Heskin*, 222 U. S. 522.

No objection of substance is made to the sufficiency of the notice of the hearing on the equalization of benefits. The lands of the railroad, described in the complaint, were described in the notice as required by the statute. At that time no assessment district had been established and no lien had attached to them nor would any attach until a final assessment had been made. § 8464; *Risty* v. *Chicago, Rock Island and Pacific Ry., supra*, 388. As the statute was construed by the supreme court of South Dakota in *State* v. *Risty*, — S. Dak. at —, 213 N. W. at 959, upon the hearing for the equalization of benefits under § 8463, "an interested party may appear and show any reason why his property should not be assessed that he could have shown at the hearing for determining whether the drainage should be established. If his property will not be benefited by the establishment of the drainage this may be shown at either hearing, and if shown at either hearing his property will not be assessed."

The state court further held that upon this hearing the land owner may be heard upon the question whether his lands are benefited by the drainage system and the extent of those benefits, if any, or whether the proposed assessment was unjust or unwarranted and may raise all constitutional objections to the assessment; citing

Milne* v. *McKinnon, 32 S. Dak. 627, 631, 632; ***State ex rel. Curtis*** v. *Pound,* 32 S. Dak. 492. From determinations of the Board on either hearing appeals lie to the circuit court under § 8469.

Appellants did not appear or file objections on the date set for either hearing and under the state statute as interpreted in *State* v. *Risty, supra,* thus lost their right to urge any objection to the assessment. As the inclusion of appellants' lands in the new assessment district depended wholly upon their being benefited by the proposed improvements, their failure to avail of the opportunity afforded by the statute to make the objections to the assessment now urged forecloses all consideration of those objections here. *Farncomb* v. *Denver,* 252 U. S. 7; *Milheim* v. *Moffat Tunnel Dist.,* 262 U. S. 710; *Gorham Mfg. Co.* v. *Tax Commission,* 266 U. S. 265; *First National Bank* v. *Weld County,* 264 U. S. 450.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.